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In The
Supreme Court of the United States

October Term, 1985

— o —
IOWA MUTUAL INSURANCE COMPANY,
Petitioner,
v.

EDWARD M. LaPLANTE, *et al.*,
Respondents.

— o —
On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

— o —
**BRIEF OF AMICUS CURIAE
BLACKFEET TRIBE OF INDIANS**

— o —
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TABLE OF CONTENTS

	Pages
INTEREST OF AMICUS BLACKFEET TRIBE OF INDIANS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Federal Diversity Statute and the Rules of Decision Act Do Not Apply to Reservation Based Claims Involving Indian Defendants.	4
A. General Federal Laws Do Not Apply to In- dians If They Abrogate Tribal Rights Un- less Congress Indicates Its Intent To Do So.	6
1. The Diversity Jurisdiction Statute and Rules of Decision Act Conflict With In- dian Immunity From State Law and Pro- tection of Tribal Self-Government.	7
2. The Diversity Jurisdiction Statute By Its Terms Did Not Apply to Indians When Enacted.	11
3. The Citizenship Act Did Not Alter or Amend Indian Immunity From State Law.	14
B. Application of the Diversity Jurisdiction Stat- ute to Indians Conflicts With the Policy of <i>Erie</i> and <i>Woods</i>	16
C. Perceived Local Prejudice Does Not Justify Abrogation of Indian Immunity From State Law or Protection of Tribal Self-Government.	17
II. Federal Diversity Jurisdiction is Limited Even If a Tribe Chooses Not to Exercise Its Exclusive Jurisdiction	19
CONCLUSION	20
APPENDIX	App. 1

TABLE OF AUTHORITIES

CASES:	Page
<i>American Indian Agr. Credit Consortium v. Fredericks</i> , 551 F.Supp. 1020 (D. Colo. 1982)	5
<i>American Indian Nat. Bank v. Red Owl</i> , 478 F.Supp. 302 (D. S.D. 1979)	5
<i>Begay v. Kerr-McGee Corp.</i> , 682 F.2d 1311 (9th Cir. 1982)	5
<i>Bowling v. United States</i> , 233 U.S. 528 (1914)	15
<i>Boyer v. Shoshone-Bannock Indian Tribes</i> , 441 P.2d 167 (D. Idaho 1968)	15
<i>British American Oil Producing Co. v. Board of Equalization</i> , 299 U.S. 159 (1936)	9
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	8
<i>Cherokee Nation v. Georgia</i> , 30 U.S. (5 Pet.) 1 (1831)	12, 16
<i>Elk v. Wilkins</i> , 112 U.S. 94 (1884)	13
<i>Erie v. Tompkins</i> , 304 U.S. 64 (1938)	3, 12, 16, 17
<i>Fisher v. District Court</i> , 424 U.S. 382 (1976)	8
<i>Goodluck v. Apache County</i> , 417 F.Supp. 13 (D. Ariz. 1975)	13
<i>Hallowell v. United States</i> , 221 U.S. 317 (1911)	15
<i>Hot Oil Service, Inc., v. Hall</i> , 366 F.2d 295 (9th Cir. 1966)	5, 10
<i>Iron Crow v. Oglala Sioux Tribe</i> , 231 F.2d 89 (8th Cir. 1956)	15
<i>Kennerly v. District Court</i> , 400 U.S. 423 (1971)	8, 10, 11, 16, 19
<i>Littell v. Nakai</i> , 344 F.2d 486 (9th Cir. 1965)	5, 10
<i>McClanahan v. Arizona Tax Commission</i> , 411 U.S. 164 (1973)	4, 7, 8, 9, 19

TABLE OF AUTHORITIES—Continued

	Page
<i>Moe v. Confederated Salish and Kootenai Tribes</i> , 425 U.S. 463 (1976)	4, 15
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	6
<i>National Farmers Union Ins. Co. v. Crow Tribe</i> , 105 S.Ct. 2447 (1985)	4, 5, 7
<i>Oneida Indian Nation v. County of Oneida</i> , 464 F.2d 916 (2d Cir. 1972), <i>rev'd and remanded on other grounds</i> , 414 U.S. 661 (1974)	16
<i>Poitra v. Demarrias</i> , 502 F.2d 23 (8th Cir. 1974)	5
<i>R. J. Williams v. Fort Belknap Housing Auth.</i> , 719 F.2d 979 (9th Cir. 1983)	5, 10, 19
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	8, 10
<i>Squire v. Capoean</i> , 351 U.S. 1 (1956)	6
<i>Standing Rock Sioux Tribe v. Dorgan</i> , 505 F.2d 1135 (8th Cir. 1974)	16
<i>Superior Oil Co. v. Merritt</i> , 619 F.Supp. 526 (D. Utah 1985)	5, 10
<i>Three Affiliated Tribes v. Wold Engineering</i> , 106 S.Ct. 2305 (1986)	20
<i>Tiger v. Western Inv. Co.</i> , 221 U.S. 286 (1911)	15
<i>Tom v. Sutton</i> , 533 F.2d 1101 (9th Cir. 1976)	14
<i>United States v. Celestine</i> , 215 U.S. 278 (1909)	15
<i>United States v. Dion</i> , 106 S.Ct. 2216 (1986)	6, 7, 16
<i>United States v. Nice</i> , 241 U.S. 591 (1916)	15
<i>United States v. Holliday</i> , 70 U.S. (3 Wall) 407 (1866)	15
<i>United States v. Wright</i> , 53 F.2d 300 (4th Cir., 1931) <i>cert. denied</i> 285 U.S. 539 (1932)	14

TABLE OF AUTHORITIES—Continued

	Page
<i>Weeks Construction, Inc. v. Oglala Sioux Housing Auth.</i> , Nos. 85 and-5129 and 5130 (8th Cir. slip opinion filed July 29, 1986)	5, 10, 19
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	7, 9, 10, 11
<i>Winton v. Amos</i> , 255 U.S. 373 (1921)	15
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	9
<i>Woods v. Interstate Realty Co.</i> , 337 U.S. 535 (1949)	3, 16, 17
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832)	7, 12, 13
CONSTITUTION AND STATUTES:	
U.S. Const. Art. I § 8, cl. 3	12
U.S. Const. Art. I, § 2, cl. 3	12, 13
Treaty of October 17, 1855, 11 Stat. 657	9
Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. § 349	14
Act of Feb. 22, 1889, 25 Stat. 276	9
Act of June 2, 1924, 43 Stat. 253 (codified as carried forward at 8 U.S.C. § 1401(b))	14, 15, 16
Act of June 18, 1934, 48 Stat. 986	1, 8
Act of Aug. 15, 1953, 67 Stat. 588 (Public Law 280)	8, 20
1 Stat. 73 (Judiciary Act of 1789)	4, 10, 12, 13
29 Stat. 353	2
88 Stat. 77, 25 U.S.C. § 1451 et seq. (Indian Financing Act)	8, 11
88 Stat. 2203, 25 U.S.C. § 450 et seq. (Indian Self-Determination and Education Assistance Act)	8

TABLE OF AUTHORITIES—Continued

	Page
25 U.S.C. § 1302(8)	20
25 U.S.C. § 1326	8, 10
28 U.S.C. § 1322(1) (Federal Diversity Jurisdiction Statute)	<i>passim</i>
28 U.S.C. § 1652 (Rules of Decision Act)	<i>passim</i>
OTHER AUTHORITIES:	
Art. IX, Articles of Confederation	13
F. Cohen, Handbook of Federal Indian Law (1982)	5, 12, 16, 19
Hart & Wechsler's The Federal Courts and the Federal System, Bator, Mishkin, Shapiro & Wechsler, ed. 1973	10
R. Strickland, Fire and the Spirits (Norman: University of Oklahoma Press, 1975)	13
S. Tyler, A History of Indian Policy (Washington: GPO 1973)	12
Wright, Law of Federal Courts (1976)	18

**INTEREST OF AMICUS BLACKFEET
TRIBE OF INDIANS**

The Blackfeet Tribe of Indians of the Blackfeet Reservation is a federally recognized tribe organized under the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 986. The Blackfeet Tribal Business Council is the governing body of the Blackfeet Reservation, and is responsible under the Tribe's Constitution for, among other things, the establishment of minor courts for the adjudication of claims or disputes and for the trial and punishment of offenses. The Tribe operates the Blackfeet Tribal Court system which exercises civil and criminal jurisdiction. Civil jurisdiction is exercised over "all suits wherein the defendant is a member of the Tribe."¹ The events out of which the present case arose took place on the Blackfeet Reservation. Defendants LaPlantes and Wellmans are all members of the Blackfeet Tribe.

The present controversy is a dispute between tribal members, the LaPlantes and Wellmans, involving the liability of one for the accident of the other. Iowa Mutual, as the Wellmans' insurer, is an integral part of the settlement of this dispute between members. A lawsuit to resolve the dispute was filed by the LaPlantes in tribal court before the present federal action was filed. J.A. 5-9. The suit named the Wellmans, Iowa Mutual and Midland Claims Service. The Tribal Court determined that it had jurisdiction in the case and refused to dismiss it for lack of

¹ A copy of the relevant portion of the Blackfeet Tribal Code is attached as Appendix A. The portion of the Tribal Code in the Appendix to Iowa Mutual's Petition for Certiorari, Pet. App. 7a-9a, contains the provisions relating to the tribal court's criminal jurisdiction, not its civil jurisdiction.

jurisdiction. J.A. 33-42. Iowa Mutual never brought its present claim in tribal court.²

Under its Constitution, the Blackfeet Tribe exercises jurisdiction within the confines of the Blackfeet Reservation boundaries as defined in the Agreement of September 26, 1895, ratified by Congress in 1896, 29 Stat. 353. The integrity of that jurisdiction and the authority of the Tribe's courts will be affected by the outcome of the present case. The Tribe has a vital interest in insuring that its authority and power as a self-governing Indian tribe and the authority of its tribal courts to adjudicate disputes arising out of transactions within its territory are not diminished. The Blackfeet Tribe therefore files this amicus brief in support of respondents' position.

SUMMARY OF ARGUMENT

The federal diversity jurisdiction statute does not apply to the kind of case, like the present one, which involves Indian defendants and reservation based claims. The diversity jurisdiction statute conflicts with another federal legislative scheme providing for Indian immunity

² As a defense to a claim for bad faith insurance adjusting brought in tribal court by the LaPlantes, Iowa Mutual answered that LaPlantes' injuries were not covered by any of the insurance policies it sold to the Wellmans. However, it never sought a declaratory judgment in tribal court that LaPlantes' claim for negligence against the Wellmans was not covered by insurance policies issued by Iowa Mutual. Iowa Mutual argues that the Blackfeet Tribal Code has no provisions for declaratory judgment actions. But if the Code does not specifically provide for such actions, neither does it preclude them. The Code does provide that the Tribal Court may apply federal law and regulations (which it interprets to include federal procedural rules) in all civil cases to fill any gaps in tribal law. In any event, the question of whether declaratory judgment actions can be brought in tribal court is a question of tribal law which can only be decided by the tribal court.

from state law and protection of tribal self-government. The diversity statute subjects Indian defendants to state law through the Rules of Decision Act, and infringes on tribal self-government. However, there is no indication, explicitly or implicitly, in the jurisdiction diversity statute or the surrounding circumstances that Congress intended the statute to abrogate Indian immunity from state law or to diminish the right of tribal governments to make their own laws and be ruled by them. Application of the diversity statute to cases like the present action also conflicts with the policy of *Erie v. Tompkins*, 304 U.S. 64 (1938) and *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), which discourages forum shopping and discrimination against in-state residents in favor of out-of-state residents.

Abrogation of Indian immunity from state law and protection of tribal self-government also is not justified on the ground that Congress intended to provide a forum free from local prejudice. In order for abrogation to be accomplished, Congress still must make its intent to abrogate clear through implicit or explicit action. It has not done so here. While amicus Blackfeet Tribe does not believe that there is any justification for federal diversity jurisdiction in this case, if such justification does exist, it is for Congress to act on and not this Court. In any case, petitioner's fears of prejudice and concerns about the competence of the Blackfeet Tribal Court are greatly exaggerated and have no basis in fact.

Because there is no federal diversity jurisdiction in the present case, the case must be dismissed. However, the Ninth Circuit in its decision below indicated that federal diversity jurisdiction is not limited if the Blackfeet Tribe chooses not to exercise jurisdiction, presumably because

there would be no infringement on tribal self-government. The Tribal Court has determined that it does have jurisdiction, but if at some point it is determined that the Tribal Court has chosen not to exercise its exclusive jurisdiction, federal diversity jurisdiction still is limited. State law is preempted by federal law in cases involving Indian defendants in reservation-based claims whether or not it infringes on tribal self-government. For this reason, the federal court could not apply state law, and it is doubtful that it could apply tribal law.

ARGUMENT

I. The Federal Diversity Jurisdiction Statute and the Rules of Decision Act Do Not Apply to Reservation Based Claims Involving Indian Defendants.

This case presents an issue requiring the construction of competing federal legislative schemes: 1) the federal diversity jurisdiction statute, 28 U.S.C. § 1322(1), and the Rules of Decision Act, 28 U.S.C. § 1652, both part of the original Federal Judiciary Act of 1789, 1 Stat. 73; and 2) the various treaties and statutes which together establish the federal legislative scheme immunizing Indians from state law and protecting tribal self-government, see *National Farmers Union Ins. Co. v. Crow Tribe*, 105 S.Ct. 2447, 2451 (1985); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172-179 (1973); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474 (1976). A review of the competing federal legislative schemes shows no indication that Congress intended to extend the reach of the diversity jurisdiction statute or the Rules of Decision Act to invade Indian immunity from state law or federal protection of tribal self-government. See *National Farm-*

ers Union Ins. Co. v. Crow Tribe, *supra* at 2453 ("there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation."); F. Cohen, *Handbook of Federal Indian Law* 253-254 (1982) (hereinafter cited as Cohen) ("In the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country") quoted in *National Farmers Union*, *supra* at 2453 n.17.

The courts which have considered the issue of diversity jurisdiction in cases involving Indian defendants have invariably found that such jurisdiction is precluded where the action arose on the reservation. *Weeks Construction, Inc. v. Oglala Sioux Housing Auth.*, Nos. 85-5129 and 5130 (8th Cir. slip opinion filed July 29, 1986); *R.J. Williams v. Fort Belknap Housing Auth.*, 719 F.2d 979 (9th Cir. 1983); *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311 (9th Cir. 1982); *Hot Oil Service, Inc. v. Hall*, 366 F.2d 295 (9th Cir. 1966); *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965); *Superior Oil Co. v. Merritt*, 619 F.Supp. 526 (D. Utah 1985). The sole exception is *Poitra v. Demarrias*, 502 F.2d 23 (8th Cir. 1974), which the Eighth Circuit in *Weeks Construction*, *supra*, now has interpreted as being a very narrow exception to the general rule that federal diversity jurisdiction is precluded.³

³ The narrow exception occurs in actions involving state-created causes of action. *Weeks*, slip opinion at 10 n.7. *Poitra* involved a state-created fund for car accident victims pursuant to the North Dakota non-resident motorist statute. 502 F.2d *supra* at 24. Two district court decisions have followed *Poitra*: *American Indian Agr. Credit Consortium v. Fredericks*, 551 F. Supp. 1020 (D.Colo. 1982); and *American Indian Nat. Bank v. Red Owl*, 478 F.Supp. 302 (D. S.D. 1979). The correctness of these decisions is now questionable after the Eighth Circuit's decision in the *Weeks* case.

In light of the case law, and given the historical and overriding importance of the federal law protecting Indians from state law, and given Congress' lack of any specific or implied intent to apply the federal diversity statute to Indians, the federal diversity jurisdiction statute cannot be read to apply to cases involving Indian defendants where the cause of action arose on the reservation.

A. General Federal Laws Do Not Apply to Indians If They Abrogate Tribal Rights Unless Congress Indicates Its Intent To Do So.

General federal laws like the diversity jurisdiction statute and the Rules of Decision Act are not applicable to Indians if they conflict with rights under federal treaties or law, unless there is "clear evidence that Congress actually considered the conflict" and chose to resolve that conflict by abrogating the federal law or treaty applicable to the Indians. *United States v. Dion*, 106 S.Ct. 2216, 2220 (1986). The requisite intent may be found in an express statement of Congress or in the legislative history and surrounding circumstances of the act, although an explicit statement is preferable. *Id.*

This rule has been interpreted to hold that the general federal income tax laws do not apply to income from sales of timber from allotted Indian lands because they conflict with protections in the General Allotment Act. *Squire v. Capoeman*, 351 U.S. 1 (1956), and to hold that the Equal Opportunity Act of 1972 did not repeal or alter other federal laws giving Indians preference in employment in the Bureau of Indian Affairs, *Morton v. Mancari*, 417 U.S. 535 (1974). On the other hand, this Court recently interpreted the Bald Eagle Protection Act as applying to the killing of eagles by Indians because Congress "reflected an unmistakable and explicit legislative choice" to abrogate

the Indians' treaty rights. *United States v. Dion, supra* at 2223. Congress had explicitly considered the effect of the statute on Indians and chose to provide only limited protection to them for religious purposes.

Application of the federal diversity jurisdiction statute and the Rules of Decision Act conflicts with federal law providing for Indian immunity from state law and protection of tribal self-government, *see* Part I.A.1 *infra*. However, there is nothing in the Judiciary Act of 1789 or any other federal act or in the surrounding circumstances of the acts which reflects an unmistakable and explicit policy choice to subject Indians to state law through application of federal diversity jurisdiction. Nor is there anything that indicates that Congress considered at all the effect of the statutes on Indian tribes. Under these circumstances, the general federal law cannot be read to apply to Indians.

1. The Diversity Jurisdiction Statute and Rules of Decision Act Conflict With Indian Immunity From State Law and Protection of Tribal Self-Government.

Indian immunity from state law is one of the fundamental elements of tribal self-government. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). This immunity is based on federal treaties and statutes which preempt state laws in Indian country. Although over the years, the exact nature and scope of tribal self-government may have changed, *see National Farmers Union Ins. Co. v. Crow Tribe*, 105 S.Ct. *supra* at 2451, Indian immunity from state law has consistently remained federal law. *See Worcester v. Georgia, supra*; *Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. Arizona Commission*, 411 U.S. 164 (1973). The articulation of the law in *Williams v. Lee, supra*, es-

established the guidelines against which modern cases are decided. Thus the right of reservation Indians to make their own laws and be ruled by them," *id.* at 220, continues to be one of the basic attributes of tribal governments, including the right to exercise exclusive jurisdiction over reservation based claims involving Indian defendants. See *Kennerly v. District Court*, 400 U.S. 423 (1971).⁴

In a latter day recognition of Indian immunity from state law, Congress has given its permission for states to assume civil and criminal jurisdiction over reservation Indians by legislative action. Act of Aug. 15, 1953, 67 Stat. 588 (Public Law 280). Public Law 280 makes clear that Indians are immune from state law unless states legislatively assume jurisdiction under the terms of the Act. See *Kennerly v. District Court*, *supra*. Since 1968, assumption of jurisdiction also requires tribal consent. 25 U.S.C. § 1326.

Congress has continually acted to protect and encourage tribal self-government. *E.g.*, Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*; Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*; Indian Financing Act, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.* This federal statutory recognition and protection of tribal self-government further bolsters the continuing validity of Indian immunity from state law. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *McClanahan v. Arizona Tax Commission*, *supra*; *Kennerly v. District Court*, *supra*. These statutes have also been relied on as the basis for preemption of state

⁴ Indeed Iowa Mutual appears to concede that Montana state courts would not have jurisdiction to adjudicate its claim. See Petitioner's Brief at 5 and 7.

law in the civil regulatory area, *e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

In the present case, specific treaties and statutes reserve to the Blackfeet Tribe exclusive jurisdiction over its reservation. The Blackfeet Reservation was originally reserved to the Tribe by Treaty of October 17, 1855, 11 Stat. 657. Article 4 of the Treaty provides that a certain large territory in what is now northwestern Montana "shall be the territory of the Blackfoot Nation, over which said nation shall exercise exclusive control" The reservation was subsequently reduced to its present size by a series of executive orders and cessions. See *British American Oil Producing Co. v. Board of Equalization of the State of Montana*, 299 U.S. 159, 162-63 (1936). Even less explicit treaty language than that found in the 1855 Treaty has been construed as recognition that "the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Williams v. Lee*, *supra* at 221-22. See *McClanahan v. Arizona Tax Commission*, *supra* at 174-75.

Montana's entry into the Union, like Arizona's, was conditioned by Congress on a disclaimer of jurisdiction over Indians and Indian property, further congressional recognition of exclusive tribal jurisdiction over reservation matters, Act of Feb. 22, 1889, 25 Stat. 276, 277.⁵

⁵ The Enabling Act which also admitted North Dakota, South Dakota and Washington to the Union required that the new states:

forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or any Indian tribes, . . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

The Enabling Act also provided that the state constitutions:

shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed. . . .

(Emphasis added). See Part I.A.2 *infra*.

Although Montana could have assumed civil jurisdiction over reservation Indians pursuant to Public Law 280, Montana has never taken such action with respect to the Blackfeet Tribe. *Kennerly v. District Court*, 400 U.S. *supra* at 425 (1971). Tribal consent is now required before such jurisdiction can be assumed. 25 U.S.C. § 1326.

A federal court sitting in a diversity case would be required by the Rules of Decision Act to apply state law.⁶ This would conflict squarely with the Indians' immunity from state law. This immunity is based on the federal treaties and statutes cited above which preempt state law in favor of exclusive tribal control.

In addition, the diversity statute as a general matter interferes with the status of Indian tribes as self-governing bodies within the reservation by providing a federal forum for activities which are within the exclusive jurisdiction of the tribe. Subjecting Indians to federal diversity jurisdiction would undermine the authority of tribal courts. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1977); *Williams v. Lee, supra*; *Weeks Construction, Inc. v. Oglala Sioux Housing Auth., supra*; *R.J. Williams v. Fort Belknap Housing Auth., supra*; *Hot Oil Service Inc. v. Hall, supra*; *Littell v. Nakai, supra*; *Superior Oil Co. v. Merritt, supra*. It would mean that important cases—

⁶ It is doubtful that the Rules of Decision Act can be read to include application of tribal law. It clearly was not contemplated at the time the Federal Judiciary Act was passed because Indians were not included within the scope of the diversity jurisdiction statute. See Part I.A.2 *infra*. The Rules of Decision Act has not been changed in any manner to provide for application of tribal law. See Hart and Wechsler's *The Federal Courts and the Federal System*, Bator, Mishkin, Shapiro & Wechsler, ed. 1973, p. 663. Nor is it likely that Congress would authorize federal courts to apply tribal law. Federal courts simply are not equipped to determine and apply the laws of hundreds of different tribes, and likely would not be interested in doing so.

those over \$10,000—would be heard in federal court, while the less important cases would remain in tribal court. And as Indians increase their economic and commercial activities under federal law and policies which encourage such activities, see e.g., Indian Financing Act, *supra*, an even greater number of cases would be brought in federal court, thus further undermining the authority of tribal courts. (The business of the federal courts would also be expanded considerably.)

In this case, a tribal court action is pending. For the federal court to now step in and usurp the function of the tribal court, would severely infringe on the self-government of the Blackfeet Tribe. There is no difference between the present action and the debt collection action in *Williams v. Lee, supra*, or *Kennerly v. District Court, supra*, which would change the nature of the infringement or make it less severe so as to warrant application of federal diversity jurisdiction.

Given the fundamental conflict between the federal diversity jurisdiction statute and the Rules of Decision Act on the one hand, and federal law providing for Indian immunity from state law and protection of tribal self-government on the other hand, the federal Indian protections are paramount unless Congress explicitly considered the conflict and decided to abrogate the protection for Indians. As the next sections will show, however, the federal diversity statute did not apply at all to Indians when it was enacted, and no subsequent amendments or other legislation made it applicable.

2. The Diversity Jurisdiction Statute By Its Terms Did Not Apply to Indians When Enacted.

Section 11 of the Federal Judiciary Act of 1789 provided for original jurisdiction in the district courts in

civil suits involving the citizens of different states. While the diversity statute has been amended a number of times, it has remained relatively unchanged in relevant part for almost two hundred years. The Rules of Decision Act requires the application of state substantive law to civil actions in federal court, including diversity cases. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). This Act, Section 34 of the Federal Judiciary Act, similarly has remained unchanged for almost two hundred years.

At the time the Judiciary Act was passed, Indians were viewed, even more so than now, as separate nations to be dealt with in a government to government relationship. See S. Tyler, *A History of Indian Policy* 32-33 (Washington: GPO, 1973); Cohen at 62-127. The Indian tribes' political independence was well established from the earliest years of the formation of the Republic, and certainly at the time of the passage of the Judiciary Act. The Indians' separate status was recognized in the Constitution, U.S. Constitution Art. I, § 8, cl. 3; Art. I § 2, cl. 3, and recognized in treaties and legislation affecting Indians, see generally Cohen at 259-270. The Indians' separate status was also acknowledged judicially in early decisions of this Court, see *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In particular, *Worcester* recognized the Indians' immunity from state law. Chief Justice Marshall stated:

The Cherokee Nation . . . is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force . . . but with the assent of the Cherokees themselves, or in conformity with treaties and with the Acts of Congress.

31 U.S. (6 Pet) at 560.⁷

⁷ Iowa Mutual states that at the time *Worcester* was decided there was recognition that state law did not extend to
(Continued on following page)

Indeed Indians were not considered citizens of either the United States or the States in which they resided. *Elk v. Wilkins*, 112 U.S. 94 (1884). It was not until almost a hundred years after passage of the Judiciary Act that it was firmly established that Indians could become naturalized citizens. *Id.* at 103-106. Thus at the time of the enactment of the federal diversity jurisdiction statute, Indians did not come within the terms of the statute because they were not citizens and there was no established method by which they could become citizens. Congress was well aware of this fact.⁸ Thus rather than intending the diversity jurisdiction statute to apply to Indians, it is clear that Congress intended to exclude them.

Because the diversity jurisdiction statute and Rules of Decision Act have remained virtually unchanged in relevant part, see Hart and Wechsler *supra* at 1050-51, nothing in these provisions has changed to make them applicable to

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reservations and there were no tribal courts to resolve disputes between Indians and outsiders, leaving only federal courts to resolve such disputes. This is plainly not the case. The Cherokees, the Tribe involved in the *Worcester* case, had a sophisticated formal court system at the time *Worcester* was decided. See R. Strickland, *Fire and the Spirits* (Norman: University of Oklahoma Press, 1975). Thus if Congress had anything in mind when the Judiciary Act was passed, it would have been the more developed system of the Cherokee Tribe. While most other tribes did not have such formal courts, they did have traditional legal systems which operated to resolve disputes. Cohen at 229-232.

⁸ The Indians' unique non-citizen status was acknowledged in the Constitution by the term "Indians not taxed," U.S. Const. art. I § 2 cl. 3. This term has been treated as describing non-citizen Indians. *Elk v. Wilkins*, 112 U.S. *supra* at 99 and 102; *Goodluck v. Apache County*, 417 F.Supp. 13, 16 (D. Ariz. 1975). Art. IX of the Articles of Confederation had also made it clear that Indians were not citizens of the states in which they resided. Art. IX gave Congress exclusive power over trade and affairs with "the Indians, not members of any of the States"

Indians. In order for the statute to apply to the present case, petitioners must therefore argue that by conferral of citizenship in the Act of June 2, 1924, 43 Stat. 253, (codified as carried forward at 8 U.S.C. § 1401(b)), Congress intended to alter or amend Indian immunity from state law and protection of tribal self-government.⁹

3. The Citizenship Act Did Not Alter or Amend Indian Immunity From State Law.

By its terms, the 1924 Act did not make the federal diversity statute and Rules of Decision Act applicable to Indians. Nor by its terms did it remove the Indians' immunity from state law or in any way reduce federal protection of tribal self-government. The 1924 Act merely states:

That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of any such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

The only way the federal diversity statute and Rules of Decision Act would be applicable is if the 1924 Act by implication removed the Indians' immunity from state law. But it has been held that the 1924 Act did not implicitly remove or reduce federal protection of Indians or in any way affect the federal-Indian relationship. *United States v. Wright*, 53 F.2d 300, 306 (4th Cir. 1931), *cert. denied* 285 U.S. 539 (1932). It also has been held that citi-

⁹ Many Indians did become naturalized citizens prior to 1924. Section 6 of the 1887 General Allotment Act in particular conferred citizenship on allotted Indians, Act of Feb. 8, 1887, 24 Stat. 388, 390, 25 U.S.C. § 349. Particular tribes were naturalized by treaty. Cohen at 643. Congress also conferred citizenship on World War I veterans. In this context, it makes even less sense that Congress intended the federal diversity jurisdiction statute to apply to Indians depending on their status as a member of a particular tribe, an allottee or a World War I veteran.

zenship did not diminish the authority of tribes over their members or terminate tribal court systems. *Tom v. Sutton*, 533 F.2d 1101, 1103 n.1 (9th Cir. 1976); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 98 (8th Cir. 1956); *Boyer v. Shoshone-Bannock Indian Tribes*, 441 P.2d 167, 170 (D. Idaho 1968).

Prior to enactment of the 1924 Act, this Court also has held on a number of occasions that citizenship was not intended to remove federal protection of Indians. The Court in *United States v. Nice*, 241 U.S. 591, 601 (1916) said:

Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.

See Winton v. Amos, 255 U.S. 373, 392 (1921); *Bowling v. United States*, 233 U.S. 528, 534 (1914); *Hallowell v. United States*, 221 U.S. 317, 324 (1911); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 315 (1911); *United States v. Celestine*, 215 U.S. 278, 288-291 (1909); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 418-420 (1866). These early cases dealt with citizenship acquired under section 6 of the General Allotment Act and other acts, but their holdings are equally instructive in construing the effect of the 1924 Act because they represent the state of the law and thus Congress' likely understanding at the time the 1924 Act was passed.

Conferral of citizenship has never been a factor in determining issues of Indian immunity from state law; issues of application of state law to Indians have been decided wholly independently from citizenship. The primary modern articulation of federal Indian immunity in *Williams v. Lee*, 358 U.S. 217 (1959) came well after conferral of citizenship in 1924. And certainly citizenship has not been a factor to authorize application of state law. *See Moe v.*

Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

If the 1924 Act did not remove Indian immunity from state law and federal protection of tribal self-government as a general matter, it is difficult to see how it can be interpreted as removing these protections for federal court diversity jurisdiction purposes. There is no indication from the statute or any surrounding circumstances that such a result was meant to be accomplished. The considered choice that *United States v. Dion*, *supra*, says is required in order to abrogate Indian immunity from state law and protection of tribal self-government is clearly missing in the 1924 Act.¹⁰

B. Application of the Diversity Jurisdiction Statute to Indians Conflicts With the Policy of *Erie* and *Woods*.

An additional reason why the federal diversity statute should not be applied is the resulting conflict with the policy of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) and *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949). The policy of these cases requires that where one "is barred from recovery in the state court, he should likewise be barred in the federal court." *Woods supra* at 538. This policy is based on the principle that for "purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State,'" and is intended to discourage forum

¹⁰ At most, the 1924 Act provided that individual Indians as citizens could avail themselves of the federal diversity statute. See *Cohen supra* at 317. But whether individuals can consent to the application of state law is not clear. See *Kennerly v. District Court*, *supra*. Tribes themselves apparently are unable to invoke diversity jurisdiction because they do not come within the terms of the statute. *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 922-23 (2d Cir. 1972), *rev'd and remanded on other grounds*, 414 U.S. 661 (1974). See also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

shopping and eliminate discrimination against citizens of the state where the federal court hearing the case sits. *Id.* at 537-38.

Federal diversity jurisdiction in cases involving reservation residents would allow a plaintiff to choose a federal forum where state substantive law must be applied, or a tribal forum where tribal law would be applied. This situation raises the very real possibility that the outcome of a case could vary depending on the court in which it is brought. This is precisely the situation which *Erie* sought to correct.

Secondly, federal diversity jurisdiction in cases involving reservation Indians discriminates against in-state residents. In-state residents would have to file in tribal court in order to obtain relief; out-of-state residents would have the option to by-pass tribal courts and file in federal court. This situation creates "discrimination against citizens of the state in favor of those authorized to invoke the diversity jurisdiction of the federal courts." *Woods supra* at 538. Application of the diversity jurisdiction statute to these kinds of cases thus creates the very inequities which *Erie* and *Woods* eliminated.

C. Perceived Local Prejudice Does Not Justify Abrogation of Indian Immunity From State Law or Protection of Tribal Self-Government.

Iowa Mutual argues that the historical reason for the diversity jurisdiction statute is to provide a forum free of local prejudice, and that this historical reason would be served by application of the diversity jurisdiction statute to reservation based claims. The historical basis for the statute, however, does not change the fact that application of the statute would invade Indian immunity from state law and diminish tribal self-government, results which can be authorized only by Congress. As we have shown, Congress

did not authorize these results. But if lack of a federal forum discourages commercial activity on the reservation, or inhibits Indians from becoming full participants in American society as petitioner argues, Congress can indeed make changes if it chooses. Until that time, the federal diversity jurisdiction statute is inapplicable to reservation based claims involving Indian defendants.

In any case, the historical basis for the diversity jurisdiction statute is unclear. *See Wright, Law of Federal Courts* 85-86 (1976). The need for the statute historically and presently has been and is controversial, *id.* at 87-92. And the justification that a federal forum free from local prejudice is necessary has been particularly criticized, *id.*

Amicus Blackfeet Tribe also points out that Iowa Mutual's fears of prejudice and concern about the competence of the tribal court have no basis in fact. Tribal judges need not be lawyers, just as many local, state and federal judges, including U.S. Supreme Court justices, need not be lawyers. Nor is there any evidence that judges who serve at the pleasure of a governing body are any more or less prejudiced than state court judges who serve at the pleasure of the electorate, or federal judges who are appointed because, among other reasons, they belong to a particular political party.

Iowa Mutual's statement that the Blackfeet Tribal Court cannot handle a case as complicated as the present one is also unfounded. The Blackfeet Tribal Court and other tribal courts handle far more complicated cases routinely. There is nothing particularly complicated by the present case which would put it outside the capabilities of the tribal court.

In short, if diversity jurisdiction is justified for reservation based claims for whatever reason, then Congress must be convinced, not this Court.

II. Federal Diversity Jurisdiction Is Limited Even If a Tribe Chooses Not to Exercise Its Exclusive Jurisdiction.

In its opinion below, the Ninth Circuit indicated that if the "tribe has not manifested an interest in adjudicating the dispute," federal diversity is "not divested," Pet. App. 5a, relying on its earlier decision in *R. J. Williams v. Fort Belknap Housing Auth.*, *supra* at 983-84. *See Weeks Construction v. Oglala Sioux Housing Auth.*, *supra* at 11. The Ninth Circuit's statement presumably is based on an assumption that there would be no infringement on tribal self-government. Both its assumption and conclusion are incorrect.

If the Tribal Court chooses not to exercise its jurisdiction,¹¹ state law still is not applicable. This is because in the class of cases involving Indian defendants and reservation-based claims, state law has been preempted by the federal treaties and statutes which leave this area to the Indians themselves regardless of whether there is any infringement on tribal self-government.¹² *McClanahan v. Arizona Tax Commission*, *supra* at 179-80; *Kennerly v. Dis-*

¹¹ The Blackfeet Tribal Court has determined that it has jurisdiction under its laws in the Tribal Court proceedings now pending. J.A. 33-42. This decision is subject to review by the Blackfeet Appeals Court and potentially by the federal district court under federal question jurisdiction.

¹² Of course, if a tribe, after considered decision, decides not to exercise certain types of jurisdiction for a particular reason, state jurisdiction may still infringe on tribal self-government. *See Cohen* at 351 ("A tribe's legislative jurisdiction over its own people and within its own territory must include the right not to legislate at all in an area, if self-government is to be meaningful.").

strict Court, supra. In addition, Public Law 280 serves as a barrier to state assumption of jurisdiction where the tribe has not consented to jurisdiction.

In such a case, a federal court sitting in diversity jurisdiction therefore could not apply state law. Neither could it apply tribal law under the Rules of Decision Act, *see* discussion p. 10, n.6. While this may mean that there may be no forum in a particular case, any perceived inequity must be viewed against "the overriding federal and tribal interests in these circumstances." *Three Affiliated Tribes v. Wold Engineering*, 106 S.Ct. 2305, 2314 (1986).¹³

CONCLUSION

For the reasons stated, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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¹³ A plaintiff in this type of case may have a claim in tribal court for denial of due process and equal protection under the 1968 Indian Civil Rights Act, 25 U.S.C. § 1302(8).

APPENDIX A

CIVIL ACTION CHAPTER 2

Sec. 1 Jurisdiction:

The Tribal Court and the State shall have concurrent and not exclusive jurisdiction of all suits wherein the defendant is a member of the Tribe which is brought before the Courts. . . .

BLACKFEET TRIBAL LAW AND ORDER CODE PREFACE

1. The Blackfeet Tribal Law and Order Code of 1967, as amended, is a Code written by the Blackfeet Tribe to be administered within the exterior boundaries of the Blackfeet Reservation of Montana, and under no conditions does the State of Montana have jurisdiction over this Code, and further that any portion now in the Blackfeet Tribal Law and Order Code of 1967, as amended, relating to concurrent jurisdiction with said State of Montana, be hereby deleted and such language shall be of no further force or effect.

(Adopted by Ordinance No. 44, Blackfeet Tribe,
December 13, 1974).